IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS (No. 250539)
Joel P. Hoekstra, Presiding Judge

MARCIA VAN TIL,

Plaintiff-Appellant,

v.

ENVIRONMENTAL RESOURCES MANAGEMENT, INC., a Pennsylvania Corporation doing business in Michigan,

Defendant-Appellee
_____/

Supreme Court Docket No. 128283
Court of Appeals Docket No. 250539
Lower Court Docket No. 02-42717-NO

BRIEF ON APPEAL – APPELLEE

ORAL ARGUMENT REQUESTED

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III. STATEMENT OF THE BASIS OF JURISDICTION

This Court has jurisdiction of this matter pursuant to MCR 7.301(A)(2), having granted Plaintiff-Appellant's Application for Leave to Appeal.

IV. STATEMENT OF QUESTIONS INVOLVED

A. DID THE CIRCUIT COURT HAVE SUBJECT MATTER JURISDICTION TO DETERMINE WHETHER PLAINTIFF WAS AN EMPLOYEE?

Plaintiff-Appellant answers "Yes."

Defendant-Appellee answers "Yes."

The Court of Appeals and the Lower Court did not address the question.

B. WAS PLAINTIFF-APPELLANT AN EMPLOYEE OF DEFENDANT-APPELLEE WITHIN THE MEANING OF MCL 418.161(1)?

Plaintiff-Appellant answered "No."

Defendant-Appellee answers "Yes."

The Court of Appeals answered "Yes."

The Lower Court answered "No."

C. WAS PLAINTIFF-APPELLANT A "STATUTORY EMPLOYEE" OF DEFENDANT-APPELLEE WITHIN THE MEANING OF MCL 418.171?

Plaintiff-Appellant answered "No."

Defendant-Appellee answers "Yes."

The Court of Appeals did not address the question, ruling it was "moot."

The Lower Court answered "Yes."

V. COUNTERSTATEMENT OF FACTS

This Counterstatement of Facts is provided to bring to this Court's attention facts that were not included in Plaintiff-Appellant's Brief on Appeal (hereafter "Brief on Appeal"). Because the narrative would be disjointed were it to include only the omitted facts, it includes all the facts that Defendant-Appellee ERM asserts are relevant to this matter.[1]

Plaintiff-Appellant Marcia Van Til is the wife of ERM's Holland, Michigan facility's long-time custodian, Byron Van Til. Byron is the only custodian for the facility. Occasionally, he strips the wax buildup from the floors, a task he performs on weekends to avoid disruption of normal business. When the work on the weekends exceeds his normal work week, he is paid overtime. Affidavit of Byron Van Til, ¶¶ 3, 4, 9 (Appendix 98a).

In September 1999, about eighteen months before the events leading to the current lawsuit, Byron Van Til had used two Saturdays to strip floors from the hallways in the same building, which are occupied by a different but related business, a laboratory. Byron requested and received permission from his supervisor for his wife to help him with that job. Affidavit of Byron Van Til, ¶ 4 (Appendix 98a); [MVT 37-42] (Appellee's Appendix 4b-5b). His wife was paid by a check written directly to her for that work, a copy of which was attached as an Exhibit to Plaintiff-Appellant's Affidavit dated March 6, 2003, ¶ 11 (Appendix 255a) She was paid a total of $334.88 for 23.5 hours of work at $14.25 per hour. Ex. A to Plaintiff-Appellant's Affidavit, (Appellee's Appendix 8b).

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[1] References to Appellee's Appendix are designated as such and, in accordance with MCR 7.308, have the letter "b" appended to the page numbers. References to Appellant's Appendix are designated as "Appendix" and have the letter "a" appended to the page number. Citations to deposition transcripts are given in square brackets with the initials of the deponent followed by the page numbers where the cited testimony appears.

In early 2001, the wax buildup needed to be removed from ERM's mailroom floor, and Saturday, February 3, 2001 was the date selected for the work. Byron again requested permission for his wife to assist him. Byron first asked one of his supervisors, Lee Dell, for permission, but Lee Dell told him he needed to ask Steve Koster, Byron's other supervisor, as that was Koster's bailiwick. Affidavit of Byron Van Til, ¶¶ 5-6 (Appendix 98a). Steve Koster asked how long the job would take, and Byron told him five or six hours if his wife helped him. Steve Koster told Byron that was a lot of paperwork to hire her for such a short time, but Byron said, "Steve, you don't have to do that. Just pay me double and I'll give half of it to my wife." Affidavit of Byron Van Til, ¶¶ 6-7 (Appendix 98a). Steve Koster agreed that Plaintiff-Appellant could help Byron and that her time would also be paid at the same rate as Byron received, which they assumed would be Byron's overtime rate:

A And we discussed how she could be paid for that service. And I believe that he [Byron Van Til] suggested that we could pay her through – by adding to his hours. And I agreed with that. And that was the arrangement.

* * * * *

Q What was her rate of pay to be?

A She was to be paid at the same rate as Byron's, times time and a half because it was an overtime rate.

Q How much in fact did Ms. Van Til, indirectly or directly, get then for the work she did at ERM?

A I don't recall exactly what Byron's pay rate at the time was. It was probably between $10, $11 an hour so you multiply that by 1.5" [SK 10-11] (Appellee's Appendix 10b-11b) *See also* Affidavit of Byron Van Til ¶¶ 8-9 (Appendix 98a).

Plaintiff-Appellant's deposition testimony establishes that, like Byron Van Til and Steve Koster, she knew she was going to be paid indirectly through Byron and that she considered the arrangement to pay her through Byron to be the equivalent of the direct payment arrangement in 1999:

Q And again, it was your understanding that you would be paid for your time. [Objection colloquy omitted.]

A Byron told me they said they didn't want to hire me because of all the paperwork, they didn't want to do all the paperwork, so they didn't want to hire me.

Q Did you say am I supposed to go in and give my time to them?

A Byron told me that he was going to get money for my coming in.

Q So it was your understanding before you showed up at the facility on February 3, 2001, that Byron's paycheck would be reflective of the time that you spent there that day?

A Yes.

Q That was okay with you?

A I didn't even think about it.

Q Just like before, you can't remember on the two previous occasions whether you got a paycheck directly or your time went on Byron's?

A Right.

Q It was about the same situation then?

A More or less. [MVT 54-55] (Appendix 236a-237a)

It should be noted that this testimony does not contradict Byron's testimony that he intended to give his wife the part of the pay for her hours, nor does it contradict the established fact that ERM intended that she would be paid for her work by means of Byron's paycheck.

After doing the work, in accordance with the arrangement, Byron overstated his time to account for the amount of time Plaintiff-Appellant had worked at the job on Feb 3, 2001, stating that he had worked 13 hours of overtime that day when in fact he had worked 8 hours and Plaintiff-Appellant 5 hours. Affidavit of Byron Van Til, ¶¶ 8-9 (Appendix 98a). Byron Van Til eventually was paid a bit in excess of his regular overtime rate for these 13 hours, although in a somewhat convoluted fashion.[2]

Part of Plaintiff-Appellant's job was to use a putty knife and hand scrubber to get the old wax from under the edges of the cupboards, an area the large scrubbing machine her husband was operating could not reach. [MVT 43] (Appellee's Appendix 5b) She wore rubber gloves and safety glasses, and at first she knelt on a piece of plastic but discarded it because it slid around. [MVT 61] (Appellee's Appendix 6b) Unfortunately, she received serious chemical burns on her lower legs and feet from the time she spent kneeling in the product used to strip the floor, which allowed her clothing from her knees down to become saturated with the corrosive product. The injuries for which she seeks recovery in this lawsuit all resulted from those chemical burns.

Plaintiff-Appellant testified that she does not operate a business stripping floors, nor does she offer or render her floor stripping services to the public or employ anyone to strip floors:

Q You never stripped floors anyplace other than the facility where the incident occurred?

A Not unless I did my floor one time.

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[2] Had Byron worked his full complement of expected hours during the pay period, these hours would automatically have been overtime hours. However, ERM's payroll office apparently calculated most of his pay for the 13 hours he and his wife worked on Feb. 3, 2001 at his standard hourly rate because Byron took 12 hours of sick time later in the same pay period to attend his wife in the hospital. This resulted in only one of the 13 hours qualifying for the time and a half overtime rate. However, as Plaintiff-Appellant acknowledged, when Byron brought this to ERM's notice, ERM made up the pay for the February 13, 2001 hours worked by Byron and his wife to more than the equivalent of Byron's time and a half overtime rate. *See* ERM's Supplemental and Reply Brief in Support of Motion for Summary Disposition (Appendix 109a, 115a, 116a), Plaintiff-Appellant's Affidavit (Appendix 255a).

Q At home.

A Yeah.

Q But you're not in the business of stripping floors.

A No way, nope.

Q And I take it you don't want to go into that business.

A Nope.

Q You don't hold yourself out to the public as a professional floor stripper.

A No.

Q You certainly don't run a business stripping floors.

A No. [MVT 73] (Appellee's Appendix 7b)

Instead, at the time of the events leading to this lawsuit, Plaintiff-Appellant's regular full-time employment was cleaning glassware used in a laboratory. [MVT 12-13] (Appellee's Appendix 2b-3b). The above testimony establishes that this work did not include stripping floors.

VI. ARGUMENT

A. THE CIRCUIT COURT DID NOT LACK SUBJECT MATTER JURISDICTION TO DETERMINE WHETHER PLAINTIFF WAS AN EMPLOYEE.

In its grant of leave to appeal, this Court directed the parties to brief the question whether the circuit court lacked subject matter jurisdiction to make a determination whether Plaintiff was an employee of Defendant within the meaning of provisions of the Worker's Disability Compensation Act, MCL 418.101 *et seq.*, (hereafter "WDCA") or whether, alternatively, that determination was a matter within the exclusive jurisdiction of the worker's compensation adjudicatory system.[3] 474 Mich 913, 705 NW2d 344 (2005). For the last twenty-two years, since the decision in *Sewell v. Clearing Machine Corp.*, 419 Mich 56, 347 NW2d 447 (1984), the law has been settled that the circuit courts and the Worker's Compensation Agency (hereafter "WCA" f/k/a the Bureau of Worker's Compensation) share concurrent jurisdiction to determine whether a case brought in one of these respective tribunals "arises under" the WDCA. As a result, this particular matter was not raised by either of the parties below, both parties having accepted that the circuit court did have subject matter jurisdiction to make that determination, so there is no prior briefing on the question. However, the Order Granting Leave to Appeal's citation to Justice Corrigan's dissenting opinion in *Yackell, supra,* strongly suggests that this Court is considering whether *Sewell, supra,* should be overruled.

As will be discussed in detail below, Defendant asserts that, under Michigan law, the circuit court had jurisdiction to determine whether Plaintiff was an employee within the meaning of the

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[3] The Order Granting Leave to Appeal stated in part: "The parties shall include among the issues briefed whether the trial court had jurisdiction to determine whether plaintiff was an employee, or whether that question must first be resolved in the worker's compensation adjudicatory system. See *Reed v. Yackell,* 473 Mich 520, 542 (2005)." This citation was to the dissenting opinion filed by Justice Corrigan.

WDCA, and *Sewell* was therefore correctly decided.[4] However, once that determination was made, and Plaintiff was found as a matter of law to be Defendant's employee within the meaning of the WDCA, the circuit court acted properly in dismissing all Plaintiff's claims for lack of subject matter jurisdiction because her exclusive remedy is within the worker's compensation system.

1. Standard of Review

This Court reviews *de novo* the legal question regarding whether the circuit court had subject matter jurisdiction to make the determination whether Plaintiff was an employee. *Travelers Ins. Co. v. Detroit Edison Co.,* 465 Mich 185, 205, 631 NW2d 733 (2001).

2. The Constitution Grants the Circuit Court Original Jurisdiction Over All Civil Suits Unless that Jurisdiction is "Prohibited By Law."

The starting point for analysis of this issue is the Michigan Constitution, specifically Const. 1963, Art. 6, § 13, which grants plenary jurisdiction to the circuit courts: "The circuit courts shall have original jurisdiction in all matters not prohibited by law." A constitutional grant of jurisdiction to a court cannot be enlarged or diminished by a court acting through court rule or otherwise. *In re Hatcher,* 443 Mich 426, 433, 505 NW2d 834 (1993).

Michigan statute, MCL 600.605, likewise describes the circuit court's jurisdiction as plenary, except where "prohibited": "Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state." Another Michigan statute, MCL 600.601, states that the circuit court has jurisdiction of all matters that would have been part of the common law when Michigan became a state. Thus, there is no question that, absent either a prohibition of the circuit court's jurisdiction or

[4] Plaintiff-Appellant agrees with Defendant-Appellee that the circuit court had subject matter jurisdiction to determine this issue. Brief on Appeal, pp. 12-31.

a grant of exclusive jurisdiction to some other "court" by the constitution or a statute, the circuit court has jurisdiction to decide the question under review.

Amicus Curiae the Worker's Compensation Law Section of the State Bar of Michigan, echoed by Justice Corrigan's dissenting opinion in *Reed v. Yackell,* 473 Mich 520, 541-561, 703 NW2d 1 (2005) (cited in the grant of leave to appeal in this case, 474 Mich 913) argues that the language of MCL 418.841(1) is such a grant of "exclusive" jurisdiction to the WCA (which is not a court). That language is as follows: "Any dispute or controversy concerning compensation or other benefits shall be submitted to the agency and all questions arising under this act shall be determined by the agency or a worker's compensation magistrate. . ." The argument is that the second clause, "all questions arising under this act shall be submitted to the agency," should be read as a prohibition of the circuit court's subject matter jurisdiction over any case that requires interpretation of any part of the WDCA, even though application of that language might result in a decision that the WDCA does not apply. See *Reed v. Yackell,* 473 Mich at 542 *et seq.*, [Corrigan, J. dissenting]; Brief On Appeal of Amicus Curiae Compensation Section of the State Bar of Michigan in the instant case, pp. 15 - 25. This argument reads the statute too broadly.

3. Divestiture of Circuit Court Jurisdiction Cannot Be Accomplished Except Under A Clear Mandate; MCL 418.841(1) Does Not Contain Such a Mandate

In interpreting Const. 1963, art. 6, § 13, this Court has previously held that "The divestiture of jurisdiction from the circuit court is an extreme undertaking. Statutes doing so are to be strictly construed. Divestiture of jurisdiction cannot be accomplished except under clear mandate of the law." *Wikman v. City of Novi,* 413 Mich 617, 645, 322 NW2d 103 (1982), *citing Leo v. Atlas Industries, Inc.,* 370 Mich 400, 402, 121 NW2d 926 (1963) and *Crane v. Reeder,* 28 Mich 527, 532-33 (1874).

In the cited passage from *Crane v. Reeder*, the Supreme Court observed that

> In dealing with statutes intended to affect or claimed to affect the continuance of jurisdiction in courts of original and general authority the law has always recognized a principle of construction which served to favor the retention of jurisdiction. * * * Indeed the authorities are very numerous and striking, that before it can be claimed that an act is to have the effect to absolutely divest a jurisdiction which has regularly and fully vested, the law in favor of it must be clear and ambiguous. * * * [I]t is very natural and reasonable to suppose that the Legislature, in so far as they should think it needful to authorize interruptions and the shiftings of jurisdiction, would express themselves with clearness and leave nothing for the play of doubt and uncertainty.

The language of MCL 418.841(1) is not such a "clear mandate" to divest the circuit court of jurisdiction, leaving much for the "play of doubt and uncertainty." Unlike other statutes which have been found to divest the circuit court of jurisdiction, it does not contain any language of prohibition of circuit court jurisdiction; nor does it contain clear, explicit language granting exclusivity of jurisdiction in the WCA.

a. MCL 418.841(1) Lacks Sufficiently Explicit Language of Prohibition or Exclusivity Similar to That Which This Court Has Previously Held is Required To Divest the Circuit Court of Portions of its Jurisdiction

The grant in MCL 418.841(1) is not stated in the same kind of language of exclusivity that this Court has previously held divests the circuit court of jurisdiction and causes exclusive jurisdiction to inhere in some judicial body other than the circuit court. For instance, in *Wikman, supra,* the Court held that the following statutory language of MCL §§ 205.741 and 205.744, taken together, was sufficient to divest the circuit courts of jurisdiction over actions to enjoin collection of special assessments, and to vest that jurisdiction in the Tax Tribunal instead: "A person or legal entity which, immediately before the effective date of this act, was entitled to proceed before the state tax commission or *circuit court* of this state for determination of a matter subject to the [tax] tribunal's jurisdiction, as provided in section 31, shall proceed only before the tribunal." And "The right to sue any agency for refund of any taxes other than by proceedings before the tribunal is abolished." *Id., quoted in Wikman,* 413 Mich at 645-46, emphasis added by Supreme Court. This

language is clear and unequivocal. Not only do the statutes directly address and explicitly prohibit ("abolish") circuit court jurisdiction, the grant of jurisdiction to the tax tribunal is an exclusive grant ("shall proceed *only* before the tribunal.")

Similarly, one section of the statute granting jurisdiction over certain matters to the probate court uses explicit language granting the probate court "exclusive original jurisdiction," while another merely grants it "jurisdiction." *Compare* the language of subsection (a) of MCL 712A.2, which grants the probate court "**Exclusive original jurisdiction superior to and regardless of** the jurisdiction of another court in proceedings concerning a juvenile under 17 years of age who is found within the county if 1 or more of the following applies: [enumerating circumstances describing delinquency]" with that of subsection (b) of MCL 712A.2 (that same statute) which grants the probate court "**Jurisdiction** in proceedings concerning a juvenile under 18 years of age found within the county: [enumerating circumstances describing neglect/abuse]. (Bold emphasis added.)

This Court, in *Krajewski v. Krajewski,* 420 Mich 729, 733-34, 362 NW2d 230 (1985) recognized that while the probate court's jurisdiction is exclusive within the first grant, its jurisdiction is only concurrent with that of the circuit court within the second grant. *See also id.,* 420 Mich at 735, n.2 [Cavanagh, J., dissenting on other grounds]; *Sovereign v. Sovereign,* 354 Mich 65, 86-87, 92 NW2d 585 (1958) [Opinion of Smith, J.], reaching the same conclusion under the pre-1963 Constitution.

Similarly, in *Parkwood Limited Dividend Housing Association v. State Housing Development Authority,* 468 Mich 763, 772, 664 NW2d 185 (2003), this Court addressed the jurisdiction of the Court of Claims and held that the following language conferred exclusive jurisdiction to the Court of Claims over a claim based on contract which sought declaratory relief:

"(1) Except as provided in sections 6419a and 6440, the jurisdiction of the court of claims, as conferred upon it by this chapter, **shall be exclusive**. . .. The court has power and jurisdiction: (a) To hear and determine all claims and demands . . . ex contractu and ex delicto, against the state [and its subparts]." MCL 600.6419. Again, this statute used explicit language of exclusivity.

The language of MCL 418.841(1) is nowhere near being so definitive as that discussed in the statutes above. While it does state that all questions arising under the WDCA shall be determined by the agency, it does not follow that such a grant of "jurisdiction" (without even using that word) to the WCA is the same as a divestiture of jurisdiction in the circuit courts to determine whether a case does "arise under" the WDCA. Based on the unequivocal nature of this Court's previous decisions, without explicit language of exclusivity, this language cannot be considered to divest the circuit court of jurisdiction.

b. Instead, the Language of MCL 418.841(1) Is Similar to that of Statutes Which Have Been Held *Do Not* Divest the Circuit Court of Jurisdiction, but, Rather, Only Accomplish a Grant of Concurrent Jurisdiction to Another Quasi-Judicial Body

Instead, the language of MCL 418.841(1) ("all questions arising under this act shall be determined") is similar to (but arguably even less definitive than) other statutes which this Court and the Court of Appeals have held do not divest the circuit court of jurisdiction. For instance, in *Rinaldo's Construction Corp. v. Michigan Bell Telephone Co.* 454 Mich 65, 559 NW2d 647 (1997), a statute, MCL 460.6(1), granted the Michigan Public Service Commission "power and jurisdiction" to hear "all matters pertaining to, necessary to, or incident to the regulation of" telephone service. This Court held that the statutory language of that statute was *insufficient* to divest the circuit courts of subject matter jurisdiction over the case, in which the plaintiff alleged the telephone company had tortiously injured its business:

> The circuit court has not been ousted of its original jurisdiction under art. 6, § 13 of the Michigan Constitution by the regulatory legislation. Under the telephone act of 1913, the MPSC possessed the "power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities, including . . . telephone . . .." M.C.L. § 460.6(1); M.S.A. § 22.13(6)(1). In other words, **the Legislature has broadly defined the power and jurisdiction of the MPSC over such matters, without explicitly providing that this power and jurisdiction is exclusive.**[13]
>
> [13] As observed by Professor LeDuc, "the statute did not grant the agency sole jurisdiction. . .." [citing LeDuc, Michigan Administrative Law, §10:51, p. 81]

454 Mich at 74, emphasis added, n. 12 omitted. Instead, the Court recognized, this language accomplished only a grant of concurrent jurisdiction in the MPSC and the circuit court. *Id.*[5]

In addition, as noted above, this Court has also held that language of MCL 712A(2)(b), granting the probate court "jurisdiction" without saying "exclusive jurisdiction," accomplished only a grant of concurrent jurisdiction over neglect/abuse cases, which jurisdiction was shared by the circuit courts, in contrast to the probate court's exclusive jurisdiction over delinquency cases under MCL 712A(2)(a). *Krajewski, supra, Sovereign, supra.*

Likewise, the language of MCL 418.841 is quite similar to the language of the arbitration act, MCL 600.5001, which the Court of Appeals in *DAIIE v. Maurizio*, 129 Mich App 166, 341

[5] The Court held that the case was proper for the application of the jurisprudential doctrine of primary jurisdiction, which requires as a starting point that there be concurrent jurisdiction between the circuit court and another quasi-judicial body. *Id.* at 70-71.

W2d 262 (1983)[6] held was not definitive enough to divest the circuit court of subject matter jurisdiction:

> When the Legislature said, in § 5001, that an arbitration agreement "shall stand as a submission to arbitration of any controversy arising under said contract not expressly exempt from arbitration by the terms of the contract" it could have meant to deprive the circuit court of jurisdiction of arbitrable disputes. **But we cannot infer such meaning from the language selected by the Legislature. Quite simply, that language, though suggestive of such meaning, does not *explicitly* deprive the circuit court of jurisdiction over arbitrable matters.** [129 Mich App at 174-75, italics in original, bold emphasis added.]

Though the Court of Appeals did not expressly so state, the decision makes clear that, based on the language of MCL 600.5001, the arbitration panel would have concurrent jurisdiction over arbitrable cases.

These cases demonstrate that when a statute grants jurisdiction to another judicial or quasi-judicial body, *without also saying in so many words that the circuit court is divested of jurisdiction,* the result is shared, concurrent jurisdiction in both the circuit court and the other judicial/quasi-judicial body.

c. The mere fact that, in analyzing whether it has jurisdiction, the court is required to apply the language of the WDCA does not necessarily mean that the case "arises under" the WDCA

The language of the WDCA, and the decisions of this court, demonstrate that the fact that the circuit court must apply the statutory provisions to the facts of the case does not necessarily mean that the case is one "arising under" the WDCA. That reasoning is circular. For instance, if a worker were to file a case alleging that his or her employer had committed an intentional tort, which cases are expressly excepted from the exclusive remedy provision of the WDCA, the circuit court

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[6] This Court cited *Maurizio* with approval with respect to this point in *Campbell v. St. John Hospital,* 434 Mich 608, 613-15, 455 NW2d 695 (1990), reaching a similar conclusion with respect to the Malpractice Arbitration Act, MCL 600.5040 *et seq.*

must make a determination *as a matter of law* whether the employee "is injured as a result of a deliberate act of the employer and the employer specifically intended the injury." MCL 418.131(1). This requires a determination of whether the case meets the following standard, set out in MCL 418.131(1) "An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." If the circuit court determines that the standard was not met, the circuit court must then dismiss the case because the employee's exclusive remedy is within the WDCA. *Travis v. Dreis & Krump Mfg Co,* 453 Mich. 149, 551 NW2d 132 (1996). Otherwise, the case can remain in circuit court. The important point of this discussion is this: to reach this decision, the circuit court must necessarily apply the specific language of the WDCA regarding the meaning of the term "intentional tort." In the instant case, the circuit court is engaging in precisely the same enterprise: that is, interpreting the statutory language to determine whether the case must proceed in the WCA or may proceed in circuit court.[7]

Similarly, in many cases the courts of this state have held it to be appropriate for a court, rather than the WCA, to determine whether a particular entity should be considered an employer, requiring interpretation of the WDCA's provisions, such as labor broker cases, parent subsidiary cases, and the like. *See, e.g. Kidder v. Miller-Davis Co.,* 455 Mich 25, 564 NW2d 872 (1997).[8]

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[7] *See also Michigan Farm Bureau v. Bureau of Workmen's Compensation,* 408 Mich 141, 289 NW2d 699 (1980) a divided opinion in which the lead opinion did not reach the question, but appeared to agree with the Court of Appeals and a concurring justice that the circuit court has jurisdiction to review the validity of rules promulgated by the BWC (now the WCA), another exercise which necessarily requires interpretation of the language of the WDCA.

[8] *See also* the discussion of these cases in the Brief on Appeal of Amicus Curiae Michigan Defense Trial Counsel, Inc., pp. 16-18. Defendant-Appellee fully concurs in the reasoning of that entire Brief and adopts its arguments by reference.

d. Summary and conclusion: The language of 418.841(1) is insufficiently explicit to deprive the circuit court of subject matter jurisdiction of a claim which does not clearly "arise under" the WDCA, Resulting in the Circuit Court Retaining Concurrent Jurisdiction with the WCA

As pointed out above, the Michigan Constitution grants to the circuit court jurisdiction over all civil matters unless that jurisdiction is prohibited by a later statute. Art. 6, § 13. The discussion above, with its comparison of the language of various statutes that have been held to divest or not to divest the circuit court of jurisdiction, demonstrate that this Court has consistently held that absent explicit statutory language expressly divesting the circuit court of jurisdiction of a matter, the circuit court must be deemed to retain jurisdiction over that matter. Granting jurisdiction to another judicial body accomplishes concurrent jurisdiction in that body, but without specific, explicit language expressly divesting the circuit court of jurisdiction, the circuit court retains its jurisdiction.

The language of MCL 418.841(1) is not explicit and it is not definitive. It does not even mention the word "jurisdiction" much less expressly state that it is to be exclusive. Nor does it mention the word "prohibit" or the word "deprive" or the word "abrogate" or the word "deny" or the word "abolish." Applying the previous decisions of this court, the language employed by the Legislature in MCL 418.841(1) was insufficiently explicit and insufficiently mandatory to divest the circuit court of its constitutionally-granted jurisdiction over a claim that does not certainly "arise under" the WDCA, such as that set out in Plaintiff's Complaint.[9] Instead, it only accomplished a grant of concurrent jurisdiction to the WCA to assess whether a case falls within the WDCA.

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[9] Once the case is determined actually to "arise under" the WDCA; that is, that the claimant is employed by defendant, the circuit court's jurisdiction drops out because the WDCA's "regulatory scheme preempts the field altogether." *Rinaldo's, supra,* 454 Mich at 74. Because there is no longer any civil tort claim due to the exclusive remedy being available within the worker's compensation system (MCL 418.131(1)), the circuit court's statutory grant of jurisdiction over "all civil claims and remedies" (MCL 600.605) becomes inoperable, and the circuit court is said to lack subject matter jurisdiction. *See, e.g. Harris v. Vernier,* 242 Mich App 306, 617 NW2d 764 (2000).

4. **Whether a Court has Subject Matter Jurisdiction To Address A Particular Case Depends Upon Whether the Complaint States a Claim That Falls Within a Class of Cases The Court is Authorized to Adjudicate**

This Court has consistently held that subject matter jurisdiction is a court's right to exercise judicial power over a class of cases, and that it concerns a court's abstract power to try a case of the kind or character of the one pending, rather than being dependent on the particular facts of the case. *Bowie v. Arder,* 441 Mich 23, 39, 490 NW2d 568 (1992), *quoting Joy v. Two-Bit Corp.,* 287 Mich 244, 253-54, 283 NW 45 (1938). Furthermore, this Court has held that "a court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the complaint is not clearly frivolous." *In re Hatcher, supra,* 443 Mich at 444. *See also Trost v. Buckstop Lure Co, Inc.,* 249 Mich App 580, 644 NW2d 54 (2002) in which the Court of Appeals observed that "a court's subject matter jurisdiction is determined only by reference to the allegations listed in the complaint." *Id.,* 249 Mich App at 586, *quoting Grubb Creek Action Committee v. Shiawassee Co. Drain Comm'r.,* 218 Mich App 665, 668-669, 554 NW2d 612 (1996). Thus, the question of the circuit court's jurisdiction over a particular case is determined *as an initial matter* by examining the complaint and determining whether the claims it raises fall into a class of cases that the circuit court is authorized to adjudicate. Then, unless and until there is a challenge to subject matter jurisdiction, *and that challenge is upheld,* the court retains jurisdiction.

In this case, Plaintiff's initial complaint raised a civil tort claim, which falls squarely within the circuit court's constitutional and statutory grants of plenary jurisdiction over civil claims. Thus, the circuit court was entitled to retain jurisdiction of the claim unless and until there was a challenge to the existence of jurisdiction, at which point, the circuit court *still* retained jurisdiction to resolve that challenge, as the law discussed in the next section establishes. The court's jurisdiction

terminates only when the court finally resolves a challenge to jurisdiction by making a finding that it lacks jurisdiction, at which point the court has no power to take any further action in the case other than dismissing it. *Bowie, supra,* 441 Mich at 56, *citing Fox v. Univ. of Michigan Bd. of Regents,* 375 Mich 238, 242, 134 NW2d 146 (1965).

5. A Court Always Has Jurisdiction to Apply the Law to the Facts to Resolve a Challenge to its Subject Matter Jurisdiction

Michigan law, like federal law, has long held that, when subject matter jurisdiction is challenged, that challenge alone does not immediately divest the circuit court of jurisdiction over the case. Instead, the circuit court retains jurisdiction to determine the question whether it has jurisdiction over a particular matter before it, *even if that determination requires review of the facts.* The venerable case of *Haywood v. Johnson,* 41 Mich 598, 2 NW 926 (1879) demonstrates the fundamental nature of this idea: "It must be admitted that the circuit court had power to decide upon its own jurisdiction, subject to review, of course, and to investigate such facts and in such mode as the attainment of the end called for. It was not brought to a stand by the bare offer of the objection. . . . **The course and extent of future action would have to depend not on the raising of the question, but on the solution of it.**" *Id.,* 41 Mich at 606, emphasis added. In fact, the circuit court not only has the power but also the obligation to make a determination whether it has subject matter jurisdiction of a particular case, and this obligation persists no matter when or by whom the issue is raised. *Bowie, supra,* 441 Mich at 56 ["a court must take notice of the limits of its authority,"]; MCR 2.116(D)(3).

Likewise, in federal court, the Sixth Circuit in *Gould, Inc. v. Pechiney Ugine Kuhlmann,* 853 F2d 445 (6th Cir 1988), observed that a district court may conduct a factual inquiry to elucidate the question of whether it has subject matter jurisdiction:

> When a challenge is to the actual subject matter jurisdiction of the court, as opposed to the sufficiency of the allegation of subject matter jurisdiction in the complaint which may be cured by an amendment to the pleading, the district court has the power to resolve any factual dispute regarding the existence of subject matter jurisdiction. In the absence of statutory direction, the district court has considerable discretion in devising the procedure to inquire into the existence of jurisdiction. Thus, the district court may consider affidavits, allow discovery, hear oral testimony, order an evidentiary hearing, or even postpone its determination if the question of jurisdiction is intertwined with the merits. [853 F2d at 451, citations omitted.][10]

Thus, it is clear that the circuit court in this case had jurisdiction to determine whether, applying the law to the undisputed facts, the Plaintiff was an "employee" within the language of the applicable statutes, because it was only by resolution of this question that the court would be able to determine whether it had subject matter jurisdiction of the Plaintiff's claim. Once having (correctly, Defendant-Appellee asserts) determined that Plaintiff was an employee within the meaning of the statute, the circuit court properly granted Defendant-Appellee's motion for summary disposition.

6. Sewell was Correctly Decided And Should Not Be Overruled

The foregoing analysis makes it abundantly clear that, in whatever posture *Sewell v. Clearing Machine Corp.*, 419 Mich 56, 347 NW2d 447 (1984) came to the Court, and however fully it may or may not have been briefed, this Court made the correct decision in holding in *Sewell* that the circuit court has concurrent jurisdiction to determine whether a case "arises under" the WDCA. A decision that the circuit court retains jurisdiction to make a determination as to its own jurisdiction therefore will not open any floodgates, sending numerous cases to the courts rather than the WCA. Rather, since that is the status quo, nothing will change. Furthermore, any valid prudential concerns outlined in Justice Corrigan's *Yackell* dissent can adequately be addressed by an observation that if and when a circuit court finds that the WCA's expertise would be helpful in

[10] *See also Walters v. Leavitt,* 376 FSupp2d 746, 752 (ED Mich 2005) ("In examining whether subject matter jurisdiction exists in a *factual* challenge, the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." (Emphasis in original.))

deciding a particular case, the court is not prevented from submitting the matter to the WCA for assistance with the particular issue.

On the other hand, however, a decision that the circuit court lacks subject matter jurisdiction to make that determination will arguably render void numerous decisions reached by circuit courts in the past twenty-two years since *Sewell* was decided. For example, this Court's holding in *Bowie v. Arder, supra,* (specifically with reference to the decision in the companion case, *Duong v. Hong*) that the circuit court lacked subject matter jurisdiction over a certain custody dispute, rendered void a circuit court decision made ten years previously, thus sending the parties to begin their custody dispute back at square one, even after the child had been in the custody of one of the parties all that time. *Id.,* 441 Mich at 56-57. Accordingly, the parties to numerous decisions made by the circuit courts pursuant to their concurrent jurisdiction since *Sewell* was decided would have grounds to challenge them.

Moreover, as ably described by the Brief on Appeal of Amicus Curiae the Michigan Defense Trial Counsel, Inc., (pp. 16-19) such an abrupt course-reversal would replace a workable, sensible division of labor with a quagmire of stilted and awkward procedural maneuvers which would be necessitated by the decision that the circuit court must abdicate to the WCA every time the potential specter of WDCA involvement is raised.

7. Conclusion: The Circuit Court Had Subject Matter Jurisdiction

Absent an explicit statutory divestiture of subject matter jurisdiction, the circuit court retains its constitutionally granted plenary jurisdiction over civil cases. Only statutes granting another judicial body "exclusive" jurisdiction or stating that "only" that judicial body has jurisdiction have been held to divest the circuit court of jurisdiction. On the flip side of the coin, statutes which

appear to grant jurisdiction to a judicial or quasi-judicial body, without accompanying language of exclusivity, have consistently been held to confer concurrent jurisdiction in that body, shared with the circuit courts. The WDCA does not contain any language granting exclusive jurisdiction to the WCA over cases which might be found not to "arise under" the WDCA. Accordingly, the circuit court had concurrent subject matter jurisdiction with the WCA to make a determination regarding whether the case "arises under" the WCA. This conclusion is bolstered by the legal principle, long the law in Michigan, holding that a circuit court always has jurisdiction to determine whether it has subject matter jurisdiction, even if that determination requires application of law to facts. *Sewell v. Machine Clearing House* was correctly decided as a matter of law, and there are also there are compelling practical and prudential reasons to uphold the decision.

8. Any Decision to Overrule *Sewell* Should Be Prospective Only

Should a majority of this Court disagree and rule that *Sewell* should be overruled, that decision should be applied only to cases following this one. Although decisions overruling earlier precedent are often given retroactive effect, that retroactivity usually applies only to cases in which the issue "has been raised and preserved." *Wayne Co. v. Hathcock,* 471 Mich 445, 484, 684 NW2d 765 (2004). Furthermore, when a case overrules "clear and uncontradicted case law" the Court can ameliorate the harsh effect of this about-face by applying it only prospectively, to cases following. *Id.* In the instant case, the parties did not raise or preserve the subject matter jurisdiction issue. Both Plaintiff-Appellant and Defendant-Appellee presumed, based on the "clear and uncontradicted case law" of *Sewell*, that the circuit court had jurisdiction concurrent with that of the WCA to decide the issue of Plaintiff-Appellant's employee status, and the parties continue to believe so.

The parties were taken by surprise by this Court's decision to use their case to raise this issue, and had no reason even to anticipate that it might. The *Yackell* opinion, containing the first

inkling that the Court was considering whether *Sewell* was correctly decided, was not issued until many months after Plaintiff-Appellant applied for leave to appeal to this Court. Accordingly, the circumstances of this case support prospective-only application, for fairness reasons alone. Furthermore, if this case is sent back to the WCA, the parties' appeal will be back to the Court of Appeals, which has already adjudicated the issues in clear and convincing fashion. It would be an unwise use of the time and resources of the agency, the lower courts and the parties to engage in such an unnecessary exercise.

B. THE COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFF WAS DEFENDANT'S EMPLOYEE WITHIN THE MEANING OF MCL 418.161

1. Standard of Review

The standard of review applicable to the interpretation and application of statutes is *de novo*. *Hoste v. Shanty Creek Mgt., Inc.,* 459 Mich 561, 569, 592 NW2d 360 (1999). The standard of review applicable to appeals from grants of summary disposition pursuant to MCR 2.116(C)(4) is also *de novo. USA Jet Airlines, Inc. v. Schick,* 247 Mich App 393, 396, 638 NW2d 112 (2001).

2. This Court's Recent Decision in *Reed v. Yackell* Renders Unmistakably Correct the Court of Appeals' Decision that Plaintiff Was an Employee Within the Meaning of MCL 418.161(1)

Five months before this Court issued its second opinion in *Reed v. Yackell, supra*, the Court of Appeals issued its unpublished decision holding that under the facts of this case, Plaintiff was an employee within the meaning of MCL 418.161(1)(*l*), which defines "employee" as "[e]very person in the service of another, under any contract of hire, express or implied. . .." In so ruling, the Court of Appeals reversed the decision of the trial court which had held that Plaintiff was not an employee

within the meaning of that statute.[11] The Court of Appeals carefully reviewed this Court's decision in *Hoste, supra*, and other cases and found that, because the undisputed facts established that Plaintiff-Appellant expected to be paid for her services in assisting her husband to clean the floors, and because Defendant-Appellee likewise expected to pay her for those services, there was an implied contract between the parties despite the fact that the money was not paid directly to her but to her husband, pursuant to the parties' prior arrangement described in the Counterstatement of Facts above. Slip Op. at 4, (Appendix 210a). Furthermore, the Court of Appeals ruled, quoting *Hoste,* 459 Mich at 575, that the contract was one "of hire" because "the benefit received by the individual" (here Plaintiff-Appellant) was "payment intended as wages." (Appendix 210a)

This Court's recent decision in *Yackell* demonstrates that although the Court of Appeals did not have the benefit of that decision, it unquestionably ruled properly in finding that Plaintiff-Appellant was an "employee" within the meaning of MCL 418.161(1).

a. The Court of Appeals Correctly Ruled that There Was An Implied Contract

This Court in *Yackell* first addressed the question of whether there was an express or implied contract, observing that, under Michigan law, a contract implied in fact arises when services are performed by one who at the time expects compensation from another who expects at the time to pay therefore. *Yackell,* 473 Mich at 531, *quoting In re Spenger's Estate,* 341 Mich 491, 493, 67 NW2d 730 (1954). The court found this test met because the plaintiff, Reed, was expecting to be paid for his services (as he had been on several previous occasions) and because the employer (Herskovitz) was expecting to pay someone to assist its full-time employee (Hadley), just as

[11] Though the trial court ruled in Defendant-Appellee's favor on the alternative MCL 418.171 ground discussed in section C of this Argument, Defendant-Appellee had cross-appealed the trial court's decision adverse to it on the MCL 418.161(1) ground.

Herskovitz had done in the past. Though Herskovitz was not aware exactly whom Hadley was planning to get to assist him, the Court stated this was not important. "All that is required to establish a contract with Reed is that Hadley had authority to hire. Hadley incontestably had that authority." *Id.,* 473 Mich at 531.

In its opinion in the instant case, the Court of Appeals applied the same test for an implied-in-fact contract (although relying on Court of Appeals precedents establishing the same rule) and concluded that there was an implied contract. This ruling was correct.

As in *Yackell,* the undisputed facts establish that Plaintiff expected to be paid for her services, just as she had been paid on a previous occasion in which she had helped her husband strip the floors. This occurred in September 1999, about eighteen months before the incident which is the subject of this lawsuit. At that time, just as in the current situation, Byron Van Til requested and obtained permission from his employer to ask his wife to assist him with the floors, after which Plaintiff-Appellant spent two weekends helping her husband strip and rewax the floors in the same building where ERM is housed. ERM owns the entire building, some of which is occupied by a related business entity. [MVT 37-41] (Appellee's Appendix 4b-5b) For her two weekends of work in 1999, Plaintiff-Appellant was paid $334.88 (translating to $14.25/hour) by a check made out to her in her own name by the related business entity. (Appellee's Appendix 8b)

In February 2001, when Byron asked his employer if he could again enlist the help of his wife to strip the floors, both ERM and Byron Van Til had in mind the previous occasion on which she had been paid excellent wages for her floor-stripping work. The undisputed facts establish that both anticipated that Plaintiff-Appellant would likewise be paid this time. However, understanding the reluctance of his boss, Steven Koster, to do the paperwork necessary to place his wife on ERM's formal payroll for a job of a few hours' duration, Byron Van Til suggested: "You don't have to do

that [fill out the paperwork.] **Just pay me double and I'll give half of it to my wife.**" Byron Van Til Affidavit (Appendix 98a). Koster agreed, thus concluding the arrangement. [SK 10] (Appellee's Appendix 10b)

As her testimony quoted in the Counterstatement of Facts establishes, Plaintiff-Appellant understood this arrangement and, by showing up for work, acquiesced in it.[12] Before she came to work that day, Plaintiff-Appellant knew that her husband had made an arrangement with ERM's Steve Koster for paying her, by which Byron's paycheck would reflect the time that she had worked plus the time that he had worked. Her testimony establishes that Plaintiff-Appellant did not care whether she was being paid directly or through her husband, and it also establishes without question that she understood that her work was going to be compensated in money by payment to her at Byron's hourly rate. [MVT 54-55] (Appendix 236a-237a)

Finally, the undisputed facts also establish that Defendant-Appellee expected to pay for Plaintiff's services; this is established by the testimony of Steve Koster as follows: "[W]e discussed how she could be paid for that service. And I believe that he suggested that we could pay her through – by adding to his hours. And I agreed with that. And that was the arrangement." [SK 10] (Appellee's Appendix 10b)

As the Court of Appeals ruled, these facts establish that the parties had an implied contract. On the day the floors were stripped, Plaintiff-Appellant arrived expecting to be paid for her work. Byron Van Til likewise expected that Plaintiff-Appellant would be paid, and Defendant-Appellee intended and expected to pay Plaintiff for her services. It did not make any difference to Plaintiff-

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[12] This Court's decision in *Higgins v. Monroe Evening News,* 404 Mich 1, 21, 272 NW2d 537 (1978) holds that a bargained-for exchange also results in an implied contract. In *Sanchez v. Eagle Alloy,* 254 Mich App 651, 666, 658 NW2d 510 (2003), *leave to appeal vacated* 471 Mich 851, 684 NW2d 342 (2004) the Court of Appeals held that such a bargained-for exchange "can be found from performance and acquiescence in that performance."

Appellant, and it likewise does not have any legal significance, that that payment was to be made to her indirectly through her husband rather than directly to her.

Plaintiff-Appellant's protestations that she was not "expecting to be paid" because she was "volunteered" by her husband to help him are belied by her husband's proposal "Just pay me double and I'll give half of it to my wife." Had the parties intended that Plaintiff-Appellant would be gratuitously "volunteering" her time to help her husband, as Plaintiff-Appellant urges, ***there would have been no need for any discussion of money.*** They are likewise belied by the fact that Plaintiff had been paid for helping her husband perform a previous floor-stripping job based on an almost identical request by her husband for his employer's permission to enlist her assistance. In *Yackell*, the fact that Reed had been paid for helping on prior occasions meant that he was expecting to be paid for helping on the occasion during which he was injured. *Yackell,* 473 Mich at 531. The same is true of Plaintiff-Appellant.

Plaintiff-Appellant's attempts to "spin" the circumstances, arguing that ERM never intended to pay her for her services because ERM did not want to formally place her on the payroll, and did not pay her because ERM did not hand the payment directly to her, would require the Court to ignore uncontradicted facts. An indirect payment is no less a payment. There is no factual dispute that ERM did actually give Byron the money for Plaintiff-Appellant's work hours as the parties had agreed; the ultimate rate of pay for both Byron and his wife for their combined thirteen hours of work (8 for Byron, 5 for Plaintiff-Appellant) was over $15.00 per hour. (Appendix 109a, 115-116a)

Also similarly to *Yackell,* Plaintiff's husband asked for and obtained his employer's permission to enlist her assistance, and this authority alone was sufficient to establish the existence of an implied contract between ERM and her. *Id,* 473 Mich at 531.

For all these reasons, there is no question that the Court of Appeals was correct in holding that there was an implied contract between Plaintiff-Appellant and Defendant-Appellee under the undisputed facts of this case.

b. <u>The *Yackell* decision demonstrates the correctness of he Court of Appeals' ruling that the parties' contract was one "of hire"</u>

In *Yackell*, this Court explained the "of hire" requirement as follows:

> As we explained in *Hoste, supra* at 576, 592 N.W.2d 360, the linchpin to determining whether a contract is "of hire" is whether the compensation paid for the service rendered was not merely a gratuity but, rather, "intended as wages, i.e., real, palpable and substantial consideration as would be expected to induce a reasonable person to give up the valuable right of a possible claim against the employer in a tort action and as would be expected to be understood as such by the employer."
>
> In the present case, the $35 to $40 that Reed received for the approximately eight hours of services satisfies the requirement we set forth in *Hoste.* [473 Mich at 532]

The Court went on to observe that as long as the hourly rate that is paid for unskilled, manual labor is "roughly equivalent to the minimum wage rate at the time" it meets *Hoste's* "real, palpable and substantial consideration" test. *Id.* at 533. Finally, the Court made it abundantly clear that the parties' actual contract rate controls and that it does not matter that the rate would be minimal if spread out over time.

> "[T]he circuit court's ad hoc approach of averaging over the entire period of occasional employment, even though there was no such agreement between the parties would, were it the law, cause most any occasional worker's wage to be insubstantial under *Hoste,* thus making worker's compensation protections for, say, all persons working episodically on a part-time basis unavailable. * * * * * [O]ur courts, rather than straining to devise some too clever reading of the parties' agreement that has as its end game the allowing of tort claims by a particular injured worker . . . should simply look to the parties' actual contract to determine the nature of what was actually agreed on and rule accordingly. [473 Mich at 533-34]

This ruling in *Yackell* accords with this Court's long-standing holding in *Higgins v. Monroe Evening News, supra*, 404 Mich at 15: "[W]e specifically hold that the amount of employee

remuneration alone cannot act as a bar to [WDCA benefits.]" In the same paragraph, the Court denied that there was any minimum number of hours required to obtain such benefits. *Id.*

In the present case, Defendant-Appellee paid Plaintiff-Appellant over $15.00 per hour for her unskilled manual labor in stripping wax from the floors. This is far above the hourly minimum wage and thus satisfies the "of hire" requirement as announced in *Hoste* and as clarified in *Yackell.* The Court of Appeals therefore correctly held that the contract between the parties was one "of hire" and this Court should uphold that conclusion.

c. The Plaintiff-Appellant Was Not An Independent Contractor

As this Court held in *Hoste,* to qualify as an employee under MCL 418.161(1), a person must not only meet the "contract of hire" requirement of subsection (1)(*l*), but also must demonstrate that they are not an independent contractor as that term is defined in subsection (1)(n). *Hoste,* 459 Mich at 573. In the present case, this requirement is a non-issue. During the entire course of this litigation, Plaintiff-Appellant has never asserted that she was an independent contractor. Nor has she ever disputed any of Defendant-Appellee's detailed arguments, based on Plaintiff-Appellant's own testimony, that as a legal matter she does not qualify as an independent contractor. *See, e.g.,* ERM's Joint Appellee/Cross-Appellant Brief filed in the Court of Appeals, p.21 (Appendix 64a); ERM's Brief in Support of Motion for Summary Disposition, filed in the trial court, pp 11-13 (Appendix 92a-94a). Her Brief to this Court says only that "it is not necessary to determine whether Marcia was an independent contractor under MCL 418.161(1)(n)" Appellant's Brief on Appeal, p. 32.

In any event, the decision in *Yackell*, requires that to be considered an independent contractor, the plaintiff, in relation to the service provided for the defendant, must maintain a business offering the same service, hold him or herself out to and render to the public the same

service, and be an employer subject to the WDCA. 473 Mich at 536. The uncontradicted testimony of Plaintiff-Appellant quoted in the Counterstatement of Facts above, demonstrates that she never stripped floors anywhere else except possibly one time at home, did not maintain a floor-stripping business, and is not an employer of wax strippers subject to the WDCA. [MVT 72] (Appellee's Appendix 7b) Thus, there can be no legal question that Plaintiff-Appellant was not an independent contractor and is thus not disqualified on that ground from being an "employee" within the meaning of MCL 418.161(1).

d. Summary and Conclusion With Respect to MCL 418.161(1) – the Court of Appeals was Correct.

One need look no further than this Court's decision in *Yackell*, rendered only seven months ago, to be certain that the Court of Appeals was correct in holding that Plaintiff-Appellant met the requirements of MCL 418.161(1) for being an "employee." First, there was an implied contract because services were performed by one who at the time expected compensation from another who expected at the time to pay therefore. Second, the contract was "of hire" because the parties agreed rate for unskilled manual labor far exceeded the minimum wage. Third, there is no doubt that Plaintiff-Appellant was not an independent contractor. Accordingly, this Court should AFFIRM the Court of Appeals ruling.

C. THE TRIAL CORRECTLY RULED THAT, AS A MATTER OF LAW, ERM WAS PLAINTIFF-APPELLANT'S "STATUTORY EMPLOYER" WITHIN THE MEANING OF MCL § 418.171

1. Standard of Review

The standard of review applicable to the interpretation and application of statutes is *de novo*. *Hoste, supra,* 459 Mich at 569. The standard of review applicable to appeals from grants of

summary disposition pursuant to MCR 2.116(C)(4) is also *de novo*. *USA Jet Airlines v. Schick, supra,* 247 Mich App at 396.

2. The Lower Court's Grant of Summary Disposition to ERM Was Based on A Ruling that ERM Was a "Statutory Employer" Under MCL § 418.171 and Thus Entitled to the Protection of the Exclusive Remedy Provision of the WDCA

The Court of Appeals did not reach this issue, dismissing it as "moot" after having determined that Defendant-Appellee was Plaintiff-Appellant's direct employer within the meaning of MCL 418.161(1), as discussed at length in Section B of the Argument. (Appendix 211a) This Court may, likewise, choose not to reach the issue depending upon its disposition of the other issues raised by this case. The argument below is submitted because MCL 418.171 provides a separate and independent reason for the finding that Plaintiff-Appellant was Defendant-Appellee's employee for the purposes of worker's compensation. This statute was the basis of the trial court's grant of summary disposition to ERM, which ruled that, based on the uncontroverted facts, ERM was a "statutory employer" of Plaintiff-Appellant within the terms of MCL § 418.171.[13] The "statutory employer" section is provided as a safety net so that injured workers who would not otherwise have access to worker's compensation benefits can recover them from entities benefited from the services the worker was providing at the time of the injury. *See, e.g., DeWitt v. Grand Rapids Fuel Co.,* 346 Mich 209, 213-14, 77 NW2d 759 (1956).

Once deemed to be a "statutory employer" ERM is obligated to pay Plaintiff-Appellant worker's compensation benefits. This Court has previously held that entities who meet the definition of a "statutory employer" and are thereby responsible for the injured worker's WDCA

[13] The term "statutory employer" has been coined to describe entities who are deemed to be responsible under MCL § 418.171 for payment of worker's compensation benefits to an injured worker, even though they do not directly employ the worker.

benefits, are thereby also entitled to the protection from civil suit afforded by MCL § 418.131(1), the exclusive remedy provision of the WDCA. *Dagenhardt v. Special Machine & Engineering, Inc.*, 418 Mich 520, 345 NW2d 164 (1984).[14] *Dagenhardt* also held that the person deemed a "statutory employer" is entitled to the immunity from tort liability afforded by the exclusive remedy provision *regardless of whether* the injured person has filed a claim or been paid worker's compensation benefits; this Court stated that these matters were "unimportant to our analysis and holding." *Id.*, 418 Mich at 530, n. 4., *see also Protective Insurance Co. v. American Mutual Liability Ins. Co.*, 143 Mich App 408, 414, 372 NW2d 577 (1985). Thus, it is immaterial to the resolution of this matter that Plaintiff-Appellant has neither made a claim for nor been paid WDCA benefits.

3. ERM Has Liability Under MCL 418.171(1) Because Plaintiff-Appellant Was Injured During the Execution of a Contract of Work Undertaken by ERM

The Michigan Supreme Court has directed that, regardless whether the case arises in the posture where an employee is seeking benefits or whether, instead, it arises in a posture where the employer is asserting it as a defense to a tort action, MCL 418.171 is to be construed in the same manner, that is, liberally in favor of affording WDCA benefits as the employee's exclusive remedy. *Wells v. Firestone Tire & Rubber Co.*, 421 Mich 641, 651, 364 NW2d 670 (1985). Thus, it makes no difference to the analysis of the statutory employer question that, in this case, it is being asserted as a defense. Likewise, as discussed above, it is immaterial that Plaintiff-Appellant has not made a claim for or been paid WDCA benefits up to the present time.

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[14] *See also Dagenhardt v. Special Machine & Engineering, Inc.*, 419 Mich 1207, 362 NW2d 217 (1984) in which Justice Boyle withdrew her earlier concurrence and joined the majority opinion issued in the case.

MCL § 418.171 is reproduced in full in the Appendix (p. 265a). Its subsection (1) is most pertinent to this discussion and is stated in full just below. It is difficult reading, but it is vital at the outset to take note of the self-referential definitions, specific to "this section" which define the terms "principal" and "contractor" as they are used in this statute.

> **Statutory principals, liability under act, indemnification; contractors; subcontractors; common law recovery prohibited**
>
> (1) If any employer subject to the provisions of this act, in this section referred to as the principal, contracts with any other person, in this section referred to as the contractor, who is not subject to this act or who has not complied with the provisions of [MCL § 418.611, requiring the provision of worker's compensation insurance] and who does not become subject to this act or comply with the provisions of section 611 prior to the date of the injury or death for which claim is made for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any person employed in the execution of the work any compensation under this act which he or she would have been liable to pay if that person had been immediately employed by the principal. If compensation is claimed from or proceedings are taken against the principal, then, in the application of this act, reference to the principal shall be substituted for reference to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the person under the employer by whom he or she is immediately employed. A contractor shall be deemed to include subcontractors in all cases where the principal gives permission that the work or any part thereof be performed under subcontract. [Emphasis added.]

Paraphrased, this statute says that any entity subject to the WDCA, which contracts for some work to be done by any other person who does not provide worker's compensation benefits, is required to pay those benefits to a worker injured while engaged in the execution of the work, as if the worker were their direct employee.

a. The *Viele* test

In *Viele v. DCMA Int'l, Inc.*, 211 Mich App 458, 536 NW2d 276 (1995), the Court of Appeals interpreted the language of subsection (1) and this Court's precedent and declared the test

to be applied to determine when an employer is liable for payment of WDCA benefits under MCL § 418.171. That test is as follows: "In order to establish liability as a statutory principal" under MCL § 418.171(1), the only matters that must be shown are as follows: "[T]here must be a contract between a principal who is covered by the Worker's Disability Compensation Act and a contractor who is not covered by the act, and the claimant's injury must occur during execution under the contract of work that was undertaken by the principal." *Id.,* 211 Mich App at 462, *citing Williams v. Lang (After Remand)*, 415 Mich 179, 194, 327 NW2d 240 (1982).

Inserting the present facts into the *Viele* analytical framework and the language of § 418.171(1), ERM is the "principal" which had a contract (in the form of an employment contract) with Byron Van Til, the "contractor" to clean its premises. Byron Van Til's duties included stripping and rewaxing the floors from time to time. Thus, the "contract of work undertaken by the principal," ERM, and "executed by or under the contractor," Byron Van Til, included the stripping of ERM's floors. Plaintiff-Appellant is the "claimant" whose "injury . . . occur[red] during execution under the contract of work [stripping the floors] that was undertaken by" ERM. Byron Van Til was not required to, and did not, have any worker's compensation coverage. Therefore, ERM is statutorily liable to pay worker's compensation benefits to Plaintiff-Appellant.

As demonstrated below, there is no factual or legal dispute regarding any of the elements that *Viele* holds must be established to find liability under MCL 418.171 for worker's compensation payments to Plaintiff-Appellant on the part of ERM.

b. <u>There is no factual or legal dispute that ERM had a contract with Byron Van Til</u>

Plaintiff-Appellant acknowledges that Byron Van Til was an employee of ERM. (Brief on Appeal, p 1). As a matter of law, an employment relationship is a contractual relationship; it is an exchange of services for payment. "[T]he relationship of employer and employee, unless created by

statute, is a contractual relationship." *Wells, supra,* 421 Mich at 663, [Levin, J., dissenting on other grounds], *citing Schulte v. American Box Board Co.,* 358 Mich 21, 24, 99 NW2d 367 (1959). Indeed, one need look no further for support of this proposition than the language of the WDCA which defines "employee" as anyone under contract. MCL § 418.161(1)(*l*). Thus, there was a contract between ERM and Byron Van Til, which by definition placed them in the relationship of "principal" and "contractor" within the specific meaning assigned to those terms by subsection (1) of MCL § 418.171.

c. There is no factual or legal dispute that ERM was "subject to" the WDCA and that Byron Van Til was not subject to the WDCA

As a legal matter, all employers are "subject to" the WDCA unless they are excluded from its requirements by other provisions. MCL § 418.111 (Appendix 256a); *Viele, supra*, 211 Mich App at 464-466. Private employers who regularly employ three or more workers or who employ at least one worker for 35 hours or more per week are required to obtain worker's compensation insurance. MCL § 418.115 (Appendix 257a). Plaintiff-Appellant admits (indeed, insists) that Byron Van Til did not regularly employ anyone. (Brief on Appeal, p. 43). Accordingly, he was not required to, and did not, carry any worker's compensation insurance at any time before Plaintiff-Appellant's injury. Thus, as a legal matter, he was not "subject to" the WDCA as an employer. There also is no factual dispute that ERM regularly employs three or more persons; indeed, Plaintiff-Appellant has used testimony from depositions of three ERM employees (Byron Van Til, Steven Koster, and Leroy Dell) (Appendix 219a-231a, 239a-249a) as evidence to support her arguments to the trial court and the Court of Appeals. ERM is therefore required to (and does) carry worker's compensation insurance; thus as a matter of law, ERM is "subject to" the WDCA.

d. There is no factual or legal dispute that the work of cleaning the floors was undertaken pursuant to the contract between ERM and Byron Van Til

Plaintiff-Appellant does not dispute that Byron Van Til was employed as ERM's janitor. Since Byron Van Til was a janitor, the employment contract between him and ERM was an agreement to provide janitorial services in exchange for wages. Plaintiff-Appellant admits that Byron's janitorial duties for ERM included stripping and rewaxing ERM's floors as needed. (Brief on Appeal, p 1) Nothing more is needed to demonstrate that stripping the floors was "work undertaken by the principal" within the meaning of MCL 418.171(1). There is no requirement that the "work undertaken" must be directly related to ERM's specific main business; instead, all that is required is that the principal ask that the work be done as part of the contract. In *Williams v. Lang, supra*, 415 Mich at 198-202, this Court expressly rejected the argument, suggested by previous holdings, that the "contract of work" must be a part of the principal's main business. Instead, the Court held, a "contract of work" comprises *any* task or part of a task which the principal has directed be done, including most particularly various types of maintenance tasks. Thus, in *Williams*, the Court found that the oil company Gulf was the "statutory employer" under MCL § 418.171 of a gas station employee who was injured while test-driving a car which had been brought into the Gulf station for repairs, even though the car repairs were only a very incidental part of the matters contracted for between Gulf and the uninsured station owner.

Here, the cleaning of ERM's floors by Byron Van Til and Plaintiff-Appellant certainly fell within the compass of "*any* work undertaken by" ERM. *Williams v. Lang, supra,* 415 Mich at 182 (emphasis in original).

e. There is no factual or legal dispute that Plaintiff-Appellant's injury occurred during the execution of the contract of work undertaken by ERM; that is, the cleaning of ERM's floors

Plaintiff-Appellant's Complaint (¶¶ 13-15)(Appellee's Appendix 14b) establishes as a factual matter that she was injured in the course of stripping the floors. It has already been established above that as a matter of law, cleaning the floors was a part of the contract of janitorial work undertaken between ERM and Byron Van Til. Thus, it can not be factually or legally controverted that her injury "occurred during the execution of the contract of work undertaken by ERM" as required by the test stated in *Viele, supra.*

f. Conclusion: ERM is Plaintiff-Appellant's Statutory Employer Under the *Viele* test

Having now addressed every point of the test set out by *Viele*, ERM has shown that there cannot be any factual or legal question that the test is satisfied. Thus, the lower court's decision to grant summary disposition was correct, because, factually and legally, ERM is Plaintiff-Appellant's statutory employer under MCL § 418.171. It now only remains to address two arguments Plaintiff-Appellant has raised pertinent to MCL § 418.171.

4. Contrary to Plaintiff-Appellant's Arguments, It is Not Necessary That The Contractual Relationship Be Configured in Any Particular Way

Plaintiff-Appellant argues that MCL § 418.171 was intended to apply only to fairly traditional contractor/subcontractor arrangements involving two different employers in a tiered relationship and that because the relationship between Byron Van Til and Plaintiff-Appellant was not such a relationship, the statute does not apply. The response to this argument is that the statute itself contains no such limitation. The terms "principal" and "contractor," while indicative of such a relationship, are expressly defined for the section and are not limited to any particular configuration of circumstances. "Principal" simply means "an employer subject to [the WDCA]" and

"contractor" is defined as "any person" with whom the principal contracts with for the execution of a contract of work. Thus, while the statute could be intended primarily to apply to certain contractor/subcontractor arrangements, it is not limited to them, and the reason for this is to allow the statute flexibility to accomplish its goal of providing worker's compensation benefits where none would otherwise be available.

Plaintiff-Appellant's Brief demonstrates a fundamental misperception of the purpose of the statute by insisting that the class of situations it reaches should be narrowly drawn: "Even if the employment relationship between ERM and Byron Van Til was viewed as a contractual one, like most employment contracts, ERM cannot make the leap from a basic employment relationship to a 'principal' and 'contractor' relationship." (Brief on Appeal, p. 40, *see also* p. 41 continuing the argument in this vein.) This turns the idea of the statute on its head. No "leap" is being made, because the statute *defines the terms principal and contractor specifically to mean nothing more than two entities that are in a contractual relationship with one another.* Therefore, by definition, the employment contract between ERM and Byron Van Til made them a "principal" and a "contractor" within the statutory meaning of those terms.

5. Contrary to Plaintiff-Appellant's Assertions, It is Not Necessary to Show That Plaintiff-Appellant was an Employee Within the Terms of MCL § 418.161(1) to Make ERM her Statutory Employer under MCL § 418.171(1)

Plaintiff-Appellant argued below, and maintains in this Court (Brief on Appeal, pp. 44-45) that, in order for ERM to be found to be Plaintiff-Appellant's statutory employer under MCL § 418.171, ERM must also establish that she is an employee under the test of MCL § 418.161(1) and cases interpreting it, most especially *Hoste, supra.* Although the statute certainly is not a model of clarity, a proper analysis demonstrates that there is no statutory support for imposing such a

requirement. Even if there were, however, the facts support a finding of a contract of hire between Byron Van Til and his wife.

a. The argument that ERM must show Plaintiff-Appellant was formally employed by Byron Van Til stems from a misunderstanding of the statute

The source of Plaintiff-Appellant's argument (that for ERM to be a statutory employer under MCL § 418.171, it must also show her to be Byron Van Til's formal employee under the test stated in MCL § 418.161(1) is not clear. It probably is derived from a misperception as to the intent of MCL § 418.171(3), which simply means to exclude persons who truly are independent contractors from being found entitled to benefits as "statutory employees." The subsection reads as follows: "This section shall apply to a principal and a contractor only if the contractor engages persons to work *other than persons who would not be considered employees under section 161(1)(d).*" (Appendix 265a, emphasis added.) In other words, the statutory employer doctrine does not apply if the contractor engages independent contractors, but does apply to all others the contractor engages.[15] Note that the word chosen for the relationship between the contractor and the claimant is not "employs." Instead, the word chosen is "engages" which is a broader term than employs.

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[15] The reference in MCL § 418.171(3) to § 161(1)(d), (that is, MCL § 418.161(1)(d)) has not been updated since subsection(1)(d) became subsection (1)(n) by the operation of the 1994 and 1996 revisions to MCL § 418.161(1). [1994 Public Act No. 97, 1994 Public Act No. 271, and 1996 Public Act No. 460] (Appellee's Appendix 20b-28b). Apparently the Legislature did not notice the need to change this cross-reference; the last revisions to MCL § 418.171 were in 1985. (Appendix 265a) However, there can be no question that the reference was intended to be made to the independent contractor provision of MCL § 418.161, *currently* its subsection (1)(n), *formerly* its subsection (1)(d), which was added by the same 1985 Act which added subsection (3) to MCL § 418.171. [1985 Public Act No. 103] (Appellee's Appendix 29-31b). A quick glance at the language of the subsection currently designated as (1)(d) further demonstrates that it cannot be that section which is meant, because it pertains to persons who ARE considered to be employees rather than persons who are NOT considered to be employees; thus gibberish is all that results from an attempt to read that section together with MCL § 418.171(3). *See* Appendix 260a for a copy of *current* subsection (1)(d) of § 418.161.

Thus, a close reading of MCL § 418.171 demonstrates that though the Legislature in 1985 amended MCL § 418.171 to add subsection (3), the purpose of that statute was nothing more than excluding true independent contractors from receiving benefits under its terms. The Legislature did not intend by the addition of this section to impose a requirement that there had to be some kind of formalized employment relationship between the contractor and the claimant for benefits to be owed by the "statutory employer." Instead, MCL § 418.171, which applies even to "contractors" who are not required to purchase worker's compensation insurance (that is, who employ very few people or employ them on a very irregular basis, *see* MCL § 418.115) clearly was intended to allow benefits to injured workers who, like Plaintiff-Appellant, are in rather casual employment relationships with the "contractors."

b. *Blanzy v. Brigadier General* simply means that the same person cannot be both the claimant and the contractor

Plaintiff-Appellant also cites *Blanzy v. Brigadier General Contractors, Inc.*, 240 Mich App 632, 613 NW2d 391 (2000) for the proposition that a showing that the contractor/worker relationship meets the requirements of a "contract of hire" is a prerequisite to application of MCL 418.171. Some language in *Blanzy* does suggest this: "In order to determine if § 171 applies, we must first determine if plaintiff was [the contractor] HCM's employee." *Id.*, 240 Mich App at 640. However, this proposition is unaccompanied by any citation to authority of any kind, and likely is simply a result of an unwillingness to assist a particularly grasping claimant.

It is clear that the *Blanzy* court's demonstrable reluctance to find that defendant was a statutory employer resulted from the peculiar fact situation at issue in that case. Properly interpreted, *Blanzy* stands for the proposition that a person cannot be both the contractor, who has failed to obtain insurance coverage, and the claimant, because in *Blanzy*, the contractor was a one-person business. It was plaintiff himself who had failed to obtain insurance coverage for work that

he himself was going to perform, and then when he was injured, he attempted to obtain worker's compensation benefits from the principal: "It strains reason to believe that § 171 was intended to afford coverage to persons such as plaintiff, who purports to be both the noncompliant subcontractor's injured employee *and* the person responsible for the subcontractor's legal compliance. There is no policy reason to allow a one-person subcontractor operation to profit from the failure of that person to comply with the worker's compensation statute." *Id.,* 249 Mich App at 640 (2000). *Blanzy*'s pronouncements, whether dictum or not, should properly be limited to similar fact situations, of which this is not one.

The *Blanzy* court's apparent interpretation of subsection (3) of MCL 418.171, to mean that the claimant had to be an employee, could also be an understandable artifact of the awkward wording of *current* subsection (1)(n), *former* subsection (1)(d) of that statute, which states that a person is an employee if he or she is not an independent contractor for one of the three reasons stated in the statute. But the absence of any reference in MCL § 418.171(3) to any other subsection of MCL § 418.161(1) suggests that the *Blanzy* court may have engrafted onto that statute an additional requirement that it did not actually contain. The actual language of MCL § 418.171(3) is that only independent contractors are excluded from coverage as statutory employees, and that anyone "other than" an independent contractor who is "engaged" to work by a contractor is entitled to the protections of the statutory employer provision.

The fact that the statute is a remedial measure which should be liberally construed to grant rather than deny benefits, *Goff v. Bil-Mar Foods (After Remand)*, 454 Mich 507, 511, 563 NW2d 214 (1997) further cuts against importing a requirement, unsupported by any statutory language,

that the person be a formal employee of the subcontractor.[16] The Legislature was doubtless aware of the very large number of very informal working arrangements that can occur and there is no suggestion that it intended to preclude such workers from receiving WDCA benefits simply because their arrangements were informal; to the contrary, its language suggests an intent to include them.

c. Even if the "contract of hire" test applies, it would be met

Furthermore, even if Plaintiff-Appellant's argument that the entire § 418.161(1) test must be applied were correct, Plaintiff-Appellant meets the definition of a person "in the service of another, under any contract of hire, express or implied" with respect to Byron Van Til for approximately the same reasons she meets that definition with respect to ERM, discussed at length in Section B. Briefly, she was under a contract of hire because she agreed to and did assist Byron with the expectation of being paid money for her services, and the agreed rate of pay satisfies Hoste's "real, palpable and substantial" test. Even if we assume that Byron never did hand over any of ERM's money to her, that does not contradict the established facts that he intended to pay her ("I'll give half to my wife") and that she intended to be paid for her services. Indeed, it would be a poor state of affairs if an employer could defeat the existence of a contract of hire simply by failing to come through on a promise to pay someone he had engaged to work for him! The promise and intention alone must be a sufficient condition for the existence of a contract of hire. Thus, the working relationship between Plaintiff-Appellant and Byron Van Til does satisfy all elements of the § 418.161(1)(*l*) test.

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[16] With good reason, neither the *Blanzy* court nor Plaintiff-Appellant has made any argument that the language "person employed in the execution of the contract of work" found in MCL § 418.171(1) is the source of a requirement that the contractor and claimant have a formal employment relationship. The Court of Appeals in *Viele, supra,* interpreted the statutory language to mean only that "the claimant's injury must occur during execution under the contract of work." *Id.,* 211 Mich App at 462. The word "employed" as it is used in that sentence, simply means "occupied."

d. Plaintiff-Appellant was not an independent contractor

In the present case, there is no factual question that Byron Van Til engaged Plaintiff-Appellant to work with him on stripping the floors. Plaintiff-Appellant admits that Byron Van Til asked ERM for permission to, and did, obtain Plaintiff-Appellant's help with the floors. (Brief on Appeal, p. 3) And as discussed in Section B of this Argument, Plaintiff-Appellant was not an independent contractor of Byron Van Til, because she did not maintain a wax stripping business, did not hold herself out to or render service to the public as a wax stripper, and was not an employer of wax strippers who was subject to the WDCA. Accordingly, because the uncontroverted facts demonstrate that Plaintiff-Appellant was not an independent contractor, and because that is the only exception to MCL § 418.171, nothing more need be shown to demonstrate that because she was engaged by Byron Van Til to work with him in stripping the floors, and because on the uncontradicted facts she otherwise meets the *Viele* test, as a matter of law Plaintiff-Appellant is ERM's statutory employee.

The decision of the trial court that ERM was Plaintiff-Appellant's "statutory employer" within the meaning of MCL 418.171 was therefore correct, and if this Court reaches the question, should AFFIRM that decision.

D. SUMMARY AND CONCLUSION OF ARGUMENT

The circuit courts had concurrent jurisdiction to make a determination whether the case "arises under" the WDCA. The language of MCL 418.841(1) is insufficiently explicit to divest the circuit court of its plenary jurisdiction granted by the Michigan Constitution, and instead is consistent with that of other statutes which have been held only to confer concurrent jurisdiction between the circuit courts and other judicial or quasi-judicial bodies. A circuit court always has jurisdiction to determine whether a case comes within its subject matter jurisdiction, even if that requires analysis and interpretation of a statute and application of statutory language to a set of facts.

The Court of Appeals was correct in finding that Plaintiff-Appellant was an employee within the meaning of MCL 418.161(1) and therefore that her exclusive remedy was provided by the WDCA. Plaintiff-Appellant met the requirements of subsection (*l*). She was under a "contract" because she provided services intending at the time to be paid for them to one who at the time intended to pay her for them (although payment was to be accomplished indirectly). The contract was "of hire" because the compensation was "real, palpable and substantial" because on an hourly rate basis, it far exceeded the statutory minimum wage that would ordinarily be payable for unskilled manual labor such as stripping floors. Nor did Plaintiff-Appellant meet the definition of an "independent contractor" within the meaning of subsection (n) because she did not hold herself out to the public as providing, regularly perform, or employ anyone else for, floor wax stripping services.

The trial court was likewise correct in finding that ERM was Plaintiff's "statutory employer" within the meaning of MCL 418.171. Plaintiff met the statutory definition because she was injured while assisting Byron Van Til in performing a task (stripping wax floors) undertaken by

ERM, which is "subject to" the WDCA, and contracted to Byron Van Til, who was not required to obtain worker's compensation insurance.

For all these reasons, this Court should affirm the decision of the Court of Appeals.

VII. RELIEF REQUESTED

(1) Defendant-Appellee requests that this Court UPHOLD the existence of subject matter jurisdiction in the circuit courts for the purpose of determining whether a case "arises under" the Worker's Disability Compensation Act. Should the Court not do so, Defendant-Appellee requests that the Court make its ruling apply only to cases following this one.

(2) Defendant-Appellee requests that this Court AFFIRM the ruling of the Court of Appeals that, as a matter of law, Plaintiff-Appellant was an employee of Defendant-Appellee within the meaning of MCL 418.161(1), and therefore AFFIRM the grant of summary disposition in favor of Defendant-Appellee and the dismissal of all Plaintiff's claims against Defendant-Appellee.

(3) In the alternative, should this Court reverse the decision of the Court of Appeals, Defendant-Appellee requests that this Court AFFIRM the ruling of the trial court that, as a matter of law, Plaintiff-Appellant was an employee of Defendant-Appellee within the meaning of MCL 418.171, and therefore AFFIRM the grant of summary disposition in favor of Defendant-Appellee and the dismissal of all Plaintiff's claims against Defendant-Appellee.

Dated: January 26, 2006

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